From: Chris Metzler
To: Microsoft ATR
Date: 1/28/02 2:56pm
Subject: Microsoft Settlement

Enclosed please find my personal comment on the proposed settlement in the U.S. vs. Microsoft antitrust action. The comment comes in the form of four attachments.

The first attachment is a text copy of a letter containing my main comment.

The second attachment contains a text copy of an appendix to that letter, going through the proposed settlement in detail and providing a point-by-point critique.

The third and fourth attachments contain the letter and appendix above again, but in .PDF format rather than text, making for more attractive viewing and printing.

Thank you for the opportunity to provide a comment.

Dr. Christopher A. Metzler

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To the United States Department of Justice, and to the United States District Court for the District of Columbia:

I am writing to take advantage of the public comment period regarding the proposed settlement in the antitrust action United States v. Microsoft Corporation, provided under the Tunney Act. I thank you for the time you will take to consider my opinions. Many of the letters you will receive as public comments on the settlement will come from computer industry professionals -- persons in the pay of either Microsoft or their competitors. I am neither. Nor, for that matter, do I have informal connections to the software development industry. My profession has been that of a research astrophysicist at prestigious research institutions. I mention this to indicate both that I believe I have the competence to critically examine the settlement and the opinions for and against, and that I have no direct or indirect material stake in the outcome of this settlement.

Despite my independence from the computer industry, as an citizen and a computer user I have strong feelings about this settlement. I believe that this settlement is not only contrary to the public interest, but would damage it instead.

As I understand, it is not illegal for Microsoft to hold an effective monopoly in personal computer operating system software. What is illegal is for Microsoft to maintain that monopoly, and attempt to extend their monopoly into other domains, using predatory or anti-competitive practices. The District Court has found that Microsoft has done this; the Court of Appeals has confirmed this judgment, and the Supreme Court has effectively confirmed it again by choosing not to hear a further appeal by Microsoft. Therefore, Microsoft has once and for all been declared guilty of such illegal conduct. Numerous Supreme Court decisions in anti-trust cases have indicated that any remedy arising out of a successful anti-trust action should deny the offending corporation the fruits of its violations. And yet, despite the fact that Microsoft was judged guilty by the court of damaging several companies illegally by its actions, there are *no* penalties aimed at making amends for Microsoft's past actions contained in this settlement. In fact, while there are numerous terms clarifying how future operations by Microsoft can be considered legal, there is *nothing*, anywhere in the settlement, that penalizes Microsoft for its past actions. In light of those past Supreme Court decisions, and in light of the flagrant nature of Microsoft's violations of the law (given that this is the second Federal anti-trust action against them, and their violation of the previous consent agreement), a settlement that entirely fails to penalize Microsoft for their past actions and denies them the fruits of their illegal conduct cannot possibly be considered to be "in the public interest."

Instead, the focus of the agreement appears to be simply to prevent future anti-trust violations. This approach is tantamount to saying "it's OK that you violated anti-trust law and illegally damaged other companies a second time, but you should stop it now." Perhaps a better way to describe it is as saying "Stop, or I shall say `stop' again!" It fails to penalize Microsoft for the wrongs already done, and only tries to instruct Microsoft to obey a law that (being a law)

they're supposed to obey anyway! This alone would be unacceptable; but in addition, the settlement as written does very little new to hinder Microsoft from continuing to maintain its monopoly, or extend it into other areas, using anti-competitive tactics. Indeed, analysts within the computer industry press have typically described the settlement as demanding almost nothing new from Microsoft. Legal specialists in technology antitrust issues not employed by Microsoft or their competitors have described the settlement as "business as usual for Microsoft . . .no significant change in the way it develops its products or sells to the marketplace."

It is true that the agreement outlines constraints on Microsoft's business practices, with the apparent intent of preventing Microsoft from using its influence as a monopoly holder either to force unfair agreements on other hardware or software vendors or to retaliate against them for actions involving non-Microsoft software. However, these constraints are extremely limited in scope, are defined in terms of subjective descriptions which are not easily enforceable, and are laden with loopholes. An appendix to this letter covers several specific flaws in the agreement in more detail; meanwhile, I wish to make several general points.

My appendix below notes how, because of subjective descriptions and loopholes, the agreement fails to set viable restrictions on Microsoft regarding the topics it actually considers. Such subjective descriptions and loopholes matter, because Microsoft has a history of using such flaws to violate agreements coming out of legal actions. For example, the consent decree originating from the earlier anti-trust action was meant to prevent such actions as the bundling of Windows 98 and Internet Explorer, but this current anti-trust action had to be started because of subjective terms Microsoft successfully entered into the previous agreement that allowed them to ignore its constraints. In the time this action has taken, Microsoft's monopolies have become even more firmly entrenched. To the extent that the requirements of Microsoft in the agreement are concrete, they are comparable to what Microsoft has been doing up to this point. And it is patently absurd to constrain a company guilty of the sorts of actions demonstrated in this court case simply be requiring them to act "in good faith." In other words, not only does the agreement fail to punish Microsoft for its past illegal actions -- actions which have damaged or even destroyed other companies attempting to compete -- but the agreement also fails in the considerably less ambitious task of clearly defining illegal actions or procedures that Microsoft must avoid.

Finally, there are many topics not addressed by the agreement at all, such as Microsoft's use of proprietary standards in file formats, and how those standards combined with Microsoft's monopoly status effectively block competing products from the marketplace. Microsoft has an effective monopoly on certain types of productivity software, such as word processors and spreadsheets (Microsoft Word and Excel, now bundled together as part of Microsoft Office). Because these monopolies are so entrenched, competitors cannot produce competing software of these types unless their software can read and write Microsoft file formats. Rather than attempting to beat such competitors in the open market, Microsoft has repeatedly acted to prevent competition from taking place at all by keeping the internal file formats for these software packages secret, and by periodically changing those file formats to block potential competitors' attempts at reverse-engineering them. That this topic is not addressed at all is yet another major failure of the agreement.

What are the consequences of these failures? Dreadful, if Microsoft's past actions predict their future ones. There has been a long history of companies profoundly damaged, or even completely destroyed, by Microsoft's anti-competitive business practices. Digital Research and Stac are two examples of companies whose products were essentially run

off the market in a flood of fraud and misinformation and, in the latter case, simple copying of their technology (for which Microsoft lost in court). This case has centered on the damage to Netscape, Sun and Apple by Microsoft's actions; there are many other such companies. We are left with a situation where an environment of innovation and competition is stymied -- stymied by fear of even bothering to enter the market, given the expectation that Microsoft will do anything to destroy your enterprise.

In the courtroom, it has been demonstrated that Microsoft has falsified and even destroyed evidence. Despite these events, accepted as fact in a court of law, no criminal penalties have been forthcoming. In recent months, we have seen news stories covering attempts by Microsoft to manipulate public opinion in unethical fashion, ranging from organized efforts to get employees to stuff online ballot boxes/polls about Microsoft and their products, to writing letters to officials on Microsoft's behalf using the names of people who are deceased.

Given this past history, that the Department of Justice would arrive at such an empty settlement with Microsoft is bizarre. After all, the verdict from the District Court was strongly in the Federal Government's favor. While the Court of Appeals subsequently rejected the breakup order, they clearly affirmed Microsoft's guilt. The position of the Federal Government was strong, and Microsoft's announcements of what penalties or restrictions they would not accept in a judgment should have carried no more weight than the assertions of a convicted felon that he "would not accept" jail time. It has been noted by Rep. John Conyers Jr., the ranking member of the House Judiciary Committee, that this settlement in fact is less onerous for Microsoft than the terms that Microsoft was willing to concede in settlement talks *before* it lost the case in the Court of Appeals. Conyers went on to describe the settlement as "like losing a game by forfeit when your team was ahead with the bases loaded and your best batter on deck." (Washington Post, 2 November 2001) Or, as an acquaintance wrote, "Can someone explain to me how you can win the trial, win the appeal, have the Supremes deny cert to the defendant, and then let the perps walk?"

So why "forfeit"? Why this settlement? The most commonly-encountered explanation is that the settlement springs purely from politics: the executives of Microsoft were major campaign contributors to the current administration. For example, Robert Lande, a professor of antitrust law who has followed the case closely, has commented that "Microsoft broke open the champagne when Bush was elected." This may or may not be an accurate assessment of the source of this agreement; but it is a difficult suspicion to dismiss; and if this suspicion is true, the claim that the agreement is in the public interest seems even more preposterous. Another explanation offered for this settlement has come from Microsoft and its employees, who have argued that the settlement is indeed in the public interest simply because it halts the continuing hindrance of the operations of the leading computer software company, and therefore is good for the high-tech industry and the economy. These statements are the modern-day equivalent of "what's good for General Motors is good for America," and they are false. It is true that our modern economic engine depends strongly upon the continuing innovation of the computer industry. However, that innovation depends in turn upon the ability of many different sources to imagine and create new software, and for those creations to be able to compete for public attention. It is indeed a bad thing to stifle the ability of the nation's largest software company to produce new products; but it is not an acceptable alternative to stifle the ability of everyone *but* that company to innovate instead.

In short, this settlement is a disaster for the citizens of the United States. It is the polar opposite of an action in the public interest.

It neither penalizes Microsoft for its past illegal, destructive acts, nor does it force the kind of change in Microsoft's current business practices necessary to prevent further predatory, anti-competitive behavior. This despite a contempt for the public and the law displayed in Microsoft's behavior in the courtroom and up to this very moment. If this settlement is upheld, I can guarantee that over its five year course, the problem with Microsoft will only worsen. This may result in yet another court challenge against Microsoft; but we have seen in this case alone how Microsoft attempts to slow the pace of court action as long as possible, the better to create a "fait accompli", as they successfully have here. If history, and this and the previous agreements in particular, are any guide, Microsoft will yet again be able to hang on to their ill-gotten gains, and be faced with a set of "restrictions" that effect no change and allow them to continue to reinforce their monopolies. The resulting damage to the prospects for innovation and competition in the high-tech sphere will be incalculable, and to the public interest even more so. If Microsoft's hegemony in the computer industry is allowed to solidify further, as this agreement would guarantee, then we will bequeath to our children the kind of future that the early anti-trust actions against Standard Oil or Jay Gould were intended to prevent: where one entity controls the dominant new industry in our economy. We can be better ancestors than that. I therefore urge you, as strongly as I can, not to accept this settlement.

Thank you for your consideration.

Sincerely,

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APPENDIX: SOME DETAILED COMMENTS ON THE TERMS OF THE AGREEMENT

The most significant complaint about this agreement is a general one. Microsoft has been found to be a monopoly by a court of law; that verdict has been affirmed by the Court of Appeals, and the Supreme Court has chosen not to review that affirmation. Therefore, under existing antitrust laws, Microsoft is required to conduct its business practices in a non-predatory/non-anti-competitive fashion. This is a standing requirement of law upon Microsoft. As noted in my letter, the agreement as written holds no penalties for past action, only "restrictions" upon future behavior. In my letter, I noted how these "restrictions" are ineffective; below, I go into more detail on some of these. But most important of all is the fact that such restrictions should be unnecessary; they attempt to restrict Microsoft from doing things that are illegal in the first place, since as a monopoly Microsoft is bound not to conduct its business in a predatory fashion. For example, requiring Microsoft in the agreement not to retaliate against companies that sell competing products with their computers is no great accomplishment; that was already illegal! In fact, enumerating such restrictions, and then providing exceptions shortly afterward, gives the impression that there are certain terms under which Microsoft is actually *allowed* to violate the law. This cannot be considered acceptable.

Below are specific comments on parts of the agreement.

Section III, Part A

Section III, Part A. has several problems. First, it only restricts what Microsoft can do against OEMs, which means makers of "Personal Computers" according to the definition given later in the settlement. The definition of "Personal Computers" used in the agreement excludes a wide class of technologies which should not be. For example, a maker of machines which are intended to be used as servers does not fall under this definition -- odd given that the distinction between machines intended as desktop PCs and machines intended as servers is often blurry. The phrasing in this Part indicates that Microsoft is perfectly free to retaliate however they choose for whatever they choose against manufacturers/vendors of server hardware.

Second, it says that Microsoft cannot retaliate by altering commercial relations with OEMs. But they can certainly retaliate by doing nice things for everyone *but* the target OEM. That might seem to be forbidden from the next clause in that sentence (including the parenthetical remark), but it isn't; that only forbids withholding *non-monetary* Consideration that others get. They can withhold new *monetary* Consideration that others get without running afoul of the agreement.

Furthermore, this Part restricts retaliation, but it doesn't restrict Microsoft from entering into really predatory licenses with companies with whom they hadn't previously been doing business. In other words, Microsoft could act so that if you were not previously licensing Windows, and wanted to be, you'd better not do anything that upsets them (such as described in Subparts 1, 2 and 3 of this Part, III A.) or you'll only get a bad license from them. You might think this is prevented by Part B immediately following; but that only applies to "Covered OEMs", not new ones.

Next, Section III, Part A restricts Microsoft from retaliating against OEMs that ship Personal Computers that include Windows and another OS or will boot more than one OS; but it doesn't restrict them from retaliating against companies that ship or are contemplating shipping

machines which do not include a Windows OS at all. Against OEMs that ship some of their Personal Computers with only a competing operating system installed, or with no operating system installed, Microsoft is perfectly free to retaliate however they like.

Next, OEMs which are not Covered OEMs can have their Windows licenses terminated without the notice and opportunity to cure described here as to be provided to Covered OEMs. What is the purpose of this distinction? Why do only the bigger OEMs get this protection? The obvious reason is "to lock them into selling Windows." In other words, a clause assisting Microsoft in further solidifying its monopoly is contained within the agreement itself!

Finally, the last paragraph says that Microsoft is not prohibited from providing Consideration if it's commensurate with the OEM's effort/expenses related to Microsoft products. But since Microsoft is not required to provide this Consideration, this means that they can use this provision of Consideration as a carrot for the kind of behavior they want OEMs to follow. The first part of this restriction might seem to forbid that, since it talks about withholding Compensation -- but that's non-monetary compensation only. They could certainly give monetary compensation (i.e. kickbacks) under this "restriction." One might think this is prevented by the restrictions in Part B immediately below -- but again, that only applies to Covered OEMs, not new ones.

Section III, Part B

Similar to the guarantees of license termination warnings/ opportunities to cure described in the previous Part, the presence of such volume discounts, and different volume discount schedules for 1-10 vs. 11-20 Covered OEMs, strongly discourages those OEMs from selling any other OS. This is another clause which *helps* Microsoft maintain its monopoly.

Section III, Part C

Since the constraints of this part only apply to Microsoft's interactions with OEMs -- makers of "Personal Computers" -- other hardware manufacturers, such as people making machines which are intended to be used as servers, *can* be restricted by Microsoft from exercising the options listed here.

Section III, Part D

Under these terms, in order to obtain information about the Windows APIs etc., one has to join MSDN or "similar mechanisms." What are the terms of so joining? Presently, MSDN subscriptions cost a lot of money. This constraint seems to be saying that to get Microsoft to play fair, everyone has to pay them! Furthermore, what's to prevent Microsoft from making joining this mechanism difficult for entities they wish to punish or abuse?

Also, this section requires Microsoft to begin providing access to APIs in a "Timely Manner," which is defined as "the time Microsoft first releases a beta test version of a Windows Operating System Product that is distributed to 150,000 or more beta testers." So if they only release it to 149,999 beta testers, this time never arrives (and so the restrictions which are to occur at that point don't)? Clearly, this "Timely Manner" demand is easily circumvented. And, for the purposes of this agreement and definition, what's a beta tester?

If the software is sent to a company, such as a member of MSDN, to be tested, does that company count as one beta tester? Or are there as many as the company has employees that *ever* sit down in front of a machine. This is not clear, and is full of possibilities for exploitation.

Section III, Part F

This section hinges on the ban against "retaliating"; it is not clearly defined what would constitute "retaliation."

Furthermore, the entities used in this Part are defined in terms of the term "Personal Computer," which again is defined in a very restrictive fashion. Again, Microsoft is allowed under this Part to retaliate against manufacturers of machines which are intended to be used as servers, for example.

Section III, Part G

Once again, Microsoft is permitted under this Part to retaliate against a wide class of hardware manufacturers and vendors because of the bizarre definition of "Personal Computer" used in this agreement.

Furthermore, an exception is provided where Microsoft "obtains a representation that it is commercially practicable" for the other party to do equal or bigger business with competing software. Nowhere does the agreement indicate from where such a representation of feasibility must come -- it could come from inside Microsoft itself! The agreement does say that the representation should be obtained "in good faith"; but that's subjective, and absurdly generous to a company that has been found guilty of repeated abusing past agreements.

Section III, Part H

In Subpart 1, allowing MS to present the options for MS or non-MS software to people as "one group" or "the other group" virtually guarantees no one will use the non-MS stuff.

Regarding the exceptions 1. and 2. to the rest of Part H, both listed near the end of the part, 2. is an enormous loophole! It allows Microsoft, and their Windows OS, to shun some non-Microsoft software simply because Microsoft or some capability of Windows itself claims that software is not up to snuff. It could be a ridiculous claim; but in the time it takes to sort it out, the practical damage to the company providing that software is done, and Microsoft's monopoly position is that much stronger. And, of course, "reasonably prompt" is a subjective term, and based on their past behavior, Microsoft can be counted upon to interpret it to their advantage.

Section III, Part I

Again, this section is hobbled both by the use of subjective terms ("reasonable") and the bizarre definition of "Personal Computer" used throughout this agreement.

Subpart 5 seems to be saying that in any agreement Microsoft signs to give people APIs or documentation or similar information, like they're supposed to provide under the agreement, Microsoft can in turn require the software makers to license to Microsoft any intellectual property

rights they might have associated with anything the software companies might do that's described in this Judgment, even if those properties are unrelated to the project for which the APIs/etc. are used. This effectively authorizes one of Microsoft's more strongly anti-competitive tactics!

Section III, Part J

This is perhaps the most flawed Part of the entire agreement.

Regarding Subpart 1 . . .who decides whether disclosure of a particular piece of information compromises the security of anti-piracy etc. systems? Microsoft? They can just say that it does, without substantiation, and thus avoid terms of this agreement. Any disagreement with Microsoft's claim, and they just drag it out forever in court while the other company dies. This sequence of events could not be more predictable. It will happen. Count on it.

Furthermore, it is important to note that effectively all communications protocols of interest include some sort of authentication process, that Microsoft's future plans involve license subscription with online verification, etc. The claim can be made that none of their APIs, relevant documentation, or Communications Protocols are completely empty of information on security protocols, software licensing, encryption, authentication, digital rights management, etc. This clause basically means that Microsoft can withhold pretty much everything. It is a loophole through which a supertanker could be sailed.

Regarding Subpart 2, how is it determined whether a licensee has a history of willful violation of intellectual property rights? Is it from past legal convictions, or findings against them in civil courts? Or is it just that Microsoft says so? And who decides whether he licensee has "a reasonable business need for the API, Documentation, or Communications Protocol"? Microsoft? And who gets to decide whether the standards Microsoft gets to establish for certifying the authenticity and viability of the business are in fact "reasonable" or "objective"? Microsoft has stated that they do not consider Open Source to be a viable model; does this mean that no one writing Open Source software would be allowed to look at the APIs or Communications Protocols? Apparently, according to the terms in this agreement.

In particular, this is an effective lock-out for designers wishing to create free software relating to anything which contains "security"-type subsystems (of the types listed in the Subpart).

And regarding 2d), since the third party, that gets to test/ensure verification and compliance with Microsoft specifications, has to be approved by Microsoft, what's to stop Microsoft from using this third party evaluation as a barrier to other companies' bringing their products to market? Nothing in this judgment.

This Part is a disaster.

Section IV, Part A

The presence of subjective terms such as "reasonable opportunity" seems like a recipe for further delays while court actions proceed.

Section IV, Part B

Three people is not a sufficiently large group to vigorously pursue everything the Technical Committee is tasked to oversee. Furthermore, the small size of the committee makes it strongly susceptible to politics: a pro-Microsoft administration means two pro-Microsoft members on the Committee voting in the third member. To a great many people, this committee appears to be an empty gesture.

And the constraint on public comments by the TC has enormous ramifications. It prevents whistle-blowing, for example. If the system breaks, and two members of the Committee are protecting Microsoft, the third can't say anything about it.

Section IV, Part D

Subpart 4c) indicates that "If the TC concludes that a complaint is meritorious, it shall advise Microsoft and the United States of its conclusion and its proposal for cure." No provision is made for what happens next. What if Microsoft disagrees with the Committee? What mechanism exists to decide what the appropriate response to the complaint will be? How long can Microsoft drag out the proceedings?

Subpart 4d) is, to be blunt, appalling. Under this agreement, if the TC finds that Microsoft has been brazenly violating this agreement, that fact can't be used in any court proceeding? And the Committee members can't talk about it in any legal proceeding? This is simply absurd; it seems intended to make sure that the Committee cannot actually accomplish anything.

Section V, Part A

This Part defines the length of the agreement as five years. This is too short for any penalty agreement, of course; anyone following this case knows that Microsoft can drag out a court action for three years at a minimum.

Section VI

"Consideration" is poorly-defined. It is not sufficiently general; there are many other forms of compensation than are listed here.

Under the definition of "Microsoft Middleware Product," existing technologies which are not listed there -- such as IIS, SQL software, etc. -- are not Microsoft Middleware Products, and so Microsoft can go ahead and continue to exploit secret capabilities of the kernel/APIs in their design, and thus maintain an unfair advantage over competing software.

As noted above several times, the definition of "Personal Computer" is far too narrow. In particular, there is often no practical distinction between desktop, "intended-for-single-user" machines, and machines intended to be used as servers. Excluding servers from the definition (and thus from the constraints of any agreement) makes no practical sense.

Also as noted above, "Timely Manner" is defined in an easily-circumvented fashion.

The definition of "Windows Operating System Product" notes that Microsoft alone gets to decide what is part of the Windows OS and what is not. If this restriction had been in place in the past, many of the claims Microsoft made in this case, later disproven, would simply

have been accepted as fact. This is a bad definition.